91-2072

No. 91-

Supreme Court, U.S.
FILED
JUN 25 1992
OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1991

TONY AVIRGAN and MARTHA HONEY,

Petitioners,

v.

JOHN HULL, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Alan B. Morrison
(Counsel of Record)
David C. Vladeck
Paul Alan Levy

Public Citizen Litigation Group
2000 P Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 833-3000

Attorneys for Petitioners Tony
Avirgan and Martha Honey

QUESTIONS PRESENTED

1. May a Court of Appeals award respondents their full attorneys' fees under Rule 38, FRAP, with no explanation other than the conclusory statement that the appeals were "frivolous," even after a petition for rehearing specifically asks the Court to explain the basis for its decision?

2. Did the Court of Appeals properly conclude that these two appeals were frivolous and that petitioners were liable for up to $400,000 in attorneys' fees, where, *inter alia*, (a) respondents filed a brief in excess of 85 pages on each appeal; (b) one of the appeals involved a sanction of approximately $1.2 million imposed against both attorneys and clients; (c) the Court of Appeals heard extended oral argument and issued a substantial, published opinion dealing with both appeals; (d) respondents claimed that their attorneys spent in excess of 2550 hours in the Court of Appeals alone, defending against legal arguments that been fully briefed and the subject of published district court opinions; and (e) respondents required a month's extension of time and 25 printed pages to oppose certiorari in this Court to deal only with one of the two appeals that was alleged to be frivolous?

PARTIES TO THE PROCEEDING

Petitioners Tony Avirgan and Martha Honey were plaintiffs in the District Court and appellants in the Court of Appeals. They were represented in the district court by Daniel P. Sheehan and his employer, the public interest law firm The Christic Institute, both of whom were non-party appellants in the Court of Appeals as a result of the sanctions imposed against them by the District Court. Both Sheehan and Christic intend to file petitions for a writ of certiorari, but because they are not parties to this petition, they are technically respondents.

Respondents John Hull, Jorge Gonzalez, Adolfo Calero, Robert Owen, John Singlaub, Ronald Joseph Martin, Sr., James McCoy, Mario Delamico, Ted Shackley, and Richard Secord, were all defendants in the District Court and appellees in the Court of Appeals. They are also the beneficiaries of the attorneys' fees order that the Court of Appeals imposed against petitioners. The remaining respondents -- Bruce Jones, Rene Corbo, Felipe Vidal, Moises Dagoberto Nunez, Francisco Chanes, Ramon Cecilio Palacio, Ricardo Gris, William Gris, Roger Lee Pallais, Amac Galil, Hector Cornillot, Alvaro Cruz, Frederico Saenz, Tom Posey, Rafael "Chi Chi" Quintero, Tom Clines, Albert Hakim, Pablo Escobar, and Jorge Ochoa -- were also defendants-appellees, but the Court of Appeals did not award them attorneys' fees.

In addition to the parties, the following persons filed briefs *amicus curiae* supporting the appellants in the Court of Appeals on the issue of the sanctions imposed by the District Court: Church of the Brethren, Church Women United, Conference of Major Superiors of Men, Peace Fellowship of the Christian Church (Disciples of Christ), Leadership Conference of Women Religious, the Maryknoll Fathers and Brothers, General Conference Mennonite Church, National Council of Churches of Christ in the U.S.A., Unitarian Universalist Association, the Womens Division of the United Methodist Board of Global Ministries, Melissa Nelken, Carl Tobias, and Mary Twitchell, Trial Lawyers for Public Justice, Public Citizen, and Alliance for Justice. Counsel of record for petitioners did not represent petitioners below,

but was counsel on the *amicus* brief submitted by Public Citizen and the Alliance for Justice.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

STATUTES AND RULES INVOLVED 2

STATEMENT OF THE CASE 4

A. Background 2

B. Proceedings in the District Court 4

C. The Opinion of the Court of Appeals 5

D. Proceedings Under Rule 38 5

REASONS FOR GRANTING THE WRIT 7

THE DECISION BELOW IS CONTRARY TO THE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS AND SO FAR DEVIATES FROM THE ACCEPTED PRACTICE AS TO WARRANT REVIEW BY THIS COURT. 7

CONCLUSION 15

TABLE OF AUTHORITIES

Cases: **Page:**

Acevedo v. INS, 538 F.2d 918 (2d Cir. 1976) 14

Avirgan v. Hull, 691 F. Supp. 1357 (S.D. Fla. 1988) 4

Borowski v. Du Puy, 850 F.2d 297 (7th Cir. 1988) 13

Brodex Corp. v. Loredin Biomedical Inc., 946 F.2d 850 (Fed. Cir. 1991) 8

Business Guides Inc. v. Chromatic Comm. Enter. Inc., 111 S. Ct. 922 (1991) 13

Constant v. United States, 929 F.2d 654 (Fed. Cir.), *cert. denied*, 111 S. Ct. 2799 (1991) 13

Cooter & Gell, 496 U.S. 384 (1990) 7, 9

Finch v. Hughes Aircraft Co., 926 F.2d 1574 (Fed. Cir. 1991) 8

Grano v. Barry, 783 F.2d 1104 (D.C. Cir. 1986) 8

Hayes v. Heckler, 785 F.2d 1455 (9th Cir. 1986) 8

Helmon Co. (V.I.) Inc. v. Hyatt Int'l Inc., 899 F.2d 250 (3rd Cir. 1990) 8, 12, 14

Hensley v. Eckerhart, 461 U.S. 424 (1983) 8

Hill v. Norfolk & Western Railway Co., 814 F.2d 1192 (7th Cir. 1987) 14

McConnell v. Critchland, 661 F.2d 116 (9th Cir. 1981) 13

Meredith v. Navistar Inter. Trans. Co., 935 F.2d 124 (7th Cir. 1991) 12

Motor Vehicle Mfgs. Ass'n v. State Farm Mutual Auto Ins. Co., 463 U.S. 29 (1983) 8

Pierce v. Underwood, 487 U.S. 552 (1988) 7

Price v. Hawaii, 939 F.2d 702 (9th Cir. 1991) 7

Sun-Tek Industries v. Kennedy Sky Lites, Inc., 856 F.2d 173 (Fed. Cir. 1988) 13, 14

Thomas v. Capital Security Services, Inc., 836 F.2d 866 (5th Cir. 1988) 8

Toscano v. Chandries S.A., 934 F.2d 383 (1st Cir. 1991) 12

Walter v. Fiorenzo, 840 F.2d 427 (7th Cir. 1988) 8

White v. General Motors Corp, 908 F.2d 675 (10th Cir. 1990) . 13

Williams v. United States Postal Service, 873 F.2d 1069 (7th Cir. 1989) 13

Statutes and Rules:

18 U.S.C. § 1964 4

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 4

28 U.S.C. § 1927 4

28 U.S.C. § 2072 13

Federal Rules of Appellate Procedure

Rule 38 ..... 2, *passim*
Rule 28(g) 10

Federal Rules of Civil Procedure

Rule 11 ..... 4, 9, 10, 11, 13, 14

In The

Supreme Court of the United States

October Term, 1991

No. 91-

TONY AVIRGAN and MARTHA HONEY,

Petitioners,

v.

JOHN HULL, *et al.*,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

OPINIONS BELOW

There are no opinions, reported or unreported, with respect to the imposition of sanctions for the appeals. The order of the Court of Appeals awarding sanctions for the appeals appears in petitioners' appendix ("Pet. App.") at 1a-2a. The order denying rehearing is unreported and appears at Pet. App. 26a. The opinion of the Court of Appeals affirming the decisions of the District Court on both the merits and sanctions appears at Pet. App. 3a-25a and is reported at 932 F.2d 1572.

JURISDICTION

The order of the Court of Appeals awarding sanctions on appeal was entered on February 26, 1992. On May 14, 1992, Justice Kennedy signed an order extending the time to file a

petition for a writ of certiorari to and including June 25, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

Rule 38 of the Federal Rules of Appellate Procedure provides as follows:

> If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

STATEMENT OF THE CASE

This petition seeks review of the order of the Court of Appeals for the Eleventh Circuit that requires petitioners and others to pay all of respondents attorneys' fees in the Court of Appeals for defending the consolidated appeals on summary judgment and Rule 11 sanctions. With no explanation whatsoever, either initially or after rehearing, the Court simply concluded that both appeals were "frivolous" and that petitioners were liable for up to $400,000 in fees, with the amount to be determined by the District Court, which has no familiarity with the appeals, rather than the Court of Appeals, which heard and decided the case. Not only is the ruling in error because it fails to explain the basis for so significant a sanction, but it is unjustified in view of the objective factors in the record, principally the seriousness with which respondents took the appeals -- as evidenced by their two 85 page briefs and more than 2550 hours spent defending the rulings below -- and the apparent attention given them by the Court of Appeals, which heard extended oral argument and produced a substantial published opinion that fully considered both the merits and the sanctions.

A. Background

Although most of the facts in this case relevant to the responsibility of respondents for the actions alleged in the complaint were in sharp dispute, there are a core of facts on which there is agreement and which form the basis for both the original

sanctions order of the District Court and the subsequent order of the Court of Appeals. The original sanction was imposed jointly and severally against these petitioners -- the plaintiffs, Tony Avirgan and Martha Honey -- as well as Daniel Sheehan, the lead counsel on the merits of this case ("Sheehan"), and his public interest law firm and employer, The Christic Institute ("Christic"), who are filing their own petition. As used herein, the term plaintiffs means only petitioners Avirgan and Honey; the term petitioners includes plaintiffs, Sheehan, and Christic. The term respondents means the defendants in the trial court who were appellees in the Court of Appeals and who were judged entitled to attorneys' fees.

On May 30, 1984, plaintiff Avirgan, a professional journalist, was attending a press conference held by Eden Pastora in La Penca Nicaragua. In an apparent attempt to kill Pastora and the journalists present, a bomb was detonated at the conference, severely injuring a number of persons, including Avirgan. As a result of his injuries, Avirgan was hospitalized, sustained major medical expenses, and lost considerable time from his work.

Both because of his journalistic interest in the activities in Central America and the injuries he sustained, plaintiff Avirgan and his wife, who is also a journalist, but who was not with him at the bombing, embarked on a major investigation of the incident at the request of several independent press organizations. They eventually published a report entitled "La Penca: Report of an Investigation," which connected a number of the respondents with the events leading to the La Penca bombing. Following publication of that report, the respondent John Hull sued plaintiffs for criminal libel in Costa Rica, and at a trial held in early May 1986, they were acquitted of the charge, a ruling that was affirmed on appeal.

Meanwhile, an investigation into these and other related events was being undertaken by Christic and Sheehan. Eventually, plaintiffs met with Sheehan, and they agreed to file a lawsuit in which Christic and Sheehan would represent plaintiffs on a pro bono basis in an effort to recover their damages and to enjoin the conspiracy which they believed had caused these and other

injuries. It was agreed that the allegations of the lawsuit would be based on both the investigation undertaken by plaintiffs and that undertaken by Sheehan and Christic. Since plaintiffs are not attorneys, the details of the complaint and the litigation were left to Sheehan and Christic.

B. Proceedings in the District Court

The complaint was filed on May 29, 1986, in the United States District Court for the Southern District of Florida with jurisdiction based on 18 U.S.C. § 1964, commonly known as the Racketeer Influenced and Corrupt Organizations Act ("RICO"), and 28 U.S.C. § 1331. Named as defendants were John Hull and a number of others who were identified in plaintiffs' La Penca report, as well as others whose participation in the conspiracy alleged in the complaint was determined through the separate investigation undertaken by Christic.

Instead of answering the complaint, defendants filed a motion to dismiss, which was denied by the District Court. Eventually, respondents moved for summary judgment, and the District Court granted the motion on the purely legal ground that there was no "admissible" evidence that showed a causal connection between the conspiracy alleged in the complaint and the injuries to the plaintiffs, because all of plaintiffs' evidence on this issue was "inadmissable hearsay." *Avirgan v. Hull*, 691 F.Supp. 1357, 1375-76 (S.D. Fla. 1988). Sheehan and Christic then appealed on behalf of the plaintiffs, contending that the motion for summary judgment had been improperly granted. In response to plaintiffs' 59 page brief, respondents filed a consolidated brief in excess of 85 pages defending the ruling below.

Meanwhile, most of the respondents moved in the District Court for sanctions, in the form of attorneys' fees and costs, relying on Rule 11 of the Federal Rules of Civil Procedure, 28 U.S.C. § 1927, and the "bad-faith" exception to the American Rule. Despite the different legal theories on which each might be held liable, Sheehan filed a single opposition on behalf of himself, Christic, and the plaintiffs. On February 2, 1989, the District Court granted the motions with respect to virtually all of the

attorneys' fees and costs sought, awarding nearly $1.2 million, jointly and severally against plaintiffs, Sheehan, and Christic.

C. The Opinion of the Court of Appeals

Appeals from the sanctions orders were consolidated with those on the merits in the Eleventh Circuit.[1] As they had done on the merits, respondents vigorously defended the sanctions decision, filing another brief in excess of 85 pages. After hearing extensive oral argument on both appeals, the Eleventh Circuit affirmed. Its opinion, which spans nearly nine printed pages in the *Federal Reporter*, considered the arguments on the merits and on the sanctions. While rejecting petitioners' contentions, the opinion does not suggest that the outcome was preordained by prior rulings of the Eleventh Circuit or this Court, or that any statute, rule, or other authority controlled either appeal, let alone made them both frivolous.

D. Proceedings Under Rule 38

In the wake of their success, respondents decided to seek fees for their work in Court of Appeals, pursuant to Rule 38, FRAP, which allows double costs and damages, including attorneys' fees, to be imposed for appeals that are "frivolous." Some of their applications were timely, and others, which were not, were permitted by the Court over petitioners' objections. Altogether, the requests for fees alleged that the attorneys had spent in excess of 2550 hours to brief and argue these two appeals, for which they sought fees of almost $400,000. Sheehan and Christic promptly filed a consolidated opposition on behalf of all four petitioners, but the Court took no action for seven months.

In the meantime, plaintiffs, who were for the first time represented by undersigned counsel of record, Sheehan, and Christic each filed petitions in this Court seeking review only of the affirmance of the sanctions ruling. Respondents obtained a 30

---

[1] Sheehan continued as lead counsel on the merits, while outside counsel were brought in on the sanctions issue.

day extension of time and then filed a consolidated opposition of more than 25 printed pages. Suddenly, the day after Christmas, the Eleventh Circuit finally ruled on petitioners' motion to stay the mandate, which had been pending since July 12, 1991, and denied it without explanation. This necessitated an emergency motion in this Court by petitioners, which respondents opposed, but which Justice Kennedy granted, staying the mandate until the Court could act on the petitions. That occurred on January 13, 1992, when the Court denied them all.

Counsel for plaintiffs then turned to the still pending motion for attorneys' fees in the Court of Appeals and concluded that it would be advisable to file a separate memorandum on behalf of the individual plaintiffs, highlighting both the reasons why no sanctions should be awarded against anyone and explaining why it would be particularly unjust to impose them on lay persons who should not be expected to discern which arguments were and were not appropriately made by their attorneys on appeal. Accordingly, on February 18, 1992, counsel moved for leave to file a supplemental memorandum of seven pages, which was attached to the motion, along with an affidavit of counsel explaining the reasons for the request.

Before the time to respond to that motion had even expired, the Court of Appeals decided that it had heard enough and granted the dormant motion for attorneys' fees, but gave no reasons beyond its conclusion that both appeals were "frivolous." Pet. App. 1a. Although that Court had read all the appellate briefs, heard the oral argument, and written the opinion, it remanded the case to the District Court "for an evidentiary hearing to determine a reasonable fee." *Id.* That same order also denied petitioners' motion for a hearing on the fees issue, and a separate order, also entered on February 26th, denied plaintiffs' motion to file their short supplemental memorandum.

Despite the magnitude of the fee liability to which they were being subjected, petitioners were reluctant to seek review in this Court without first affording the panel an opportunity to explain what it had done and why. Therefore, they filed a timely petition for rehearing in which they pointed out that courts that grant fee

awards are obligated to explain the basis for doing so, and then raised a number of specific questions which they believed the Court of Appeals should answer in order to justify its conclusion that both appeals were frivolous. Pet. App. 27a-33a. Among the points that petitioners made was that the Court of Appeals had failed even to state which persons were liable for which fees on which appeals. *Id.* at 31a. The Court afforded respondents an opportunity to reply, and a month after their response was received, the Court entered an order in which it said no more than that rehearing "is DENIED." *Id.* at 26a.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW IS CONTRARY TO THE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS AND SO FAR DEVIATES FROM THE ACCEPTED PRACTICE AS TO WARRANT REVIEW BY THIS COURT.

Review is warranted in this case because the Court of Appeals acted in a wholly arbitrary manner in imposing sanctions against petitioners in the form of attorneys' fees that may well reach $400,000, and in refusing, both in its initial decision and on rehearing, to explain the basis for its ruling. This conduct by the Court of Appeals overcame any presumption of regularity that would permit this Court to assume that the Court of Appeals properly exercised its discretion in ruling on the sanctions for these two appeals.

1. The decision whether to impose sanctions is committed to the discretion of the court before which the allegedly improper conduct occurred. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990); *Price v. Hawaii*, 939 F.2d 702, 710 n.10 (9th Cir. 1991). In reaching that conclusion, this Court analogized sanctions orders to awards of attorneys' fees, which are also reviewed under an abuse of discretion standard. *Cooter & Gell*, 496 U.S. at 403, *citing Pierce v. Underwood*, 487 U.S. 552 (1988). And, in the context of attorneys' fees, this Court has made it clear that the court awarding the fees must explain its rationale for doing so, in part to assure that the basis for the ruling is available for any

reviewing court. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

The principal reason why review is required here is because the Court of Appeals gave no explanation for imposing sanctions beyond the one word description of the two appeals as "frivolous." On the possibility that this failure to explain was an oversight, petitioners filed for rehearing, explaining the Court's obligations, citing relevant authority, and asking for the basis for the decision. Once again, the Court of Appeals' answer was a single word, this time "DENIED." The petition for rehearing did more than ask for an explanation: it pointed to 11 specific questions that needed to be addressed in order to justify the sanctions order (Pet. App. 29a-31a), yet even that had no effect. Thus, there can be no doubt that the panel below consciously decided that it will not explain its decision.

Beyond the general principle that a court or agency relying on its discretion must show that it has, in fact, reasonably exercised that discretion, and done so within the bounds of law, *Motor Vehicle Mfgs. Ass'n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 57 (1983), the courts are quite clear that there is a specific obligation to explain the basis for a sanctions award and its doctrinal analog, an attorney's fee award, *Hensley*, *supra*; *Walter v. Fiorenzo*, 840 F.2d 427, 436 (7th Cir. 1988); *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866, 883 (5th Cir. 1988) (*en banc*); *Hayes v. Heckler*, 785 F.2d 1455, 1456-57 (9th Cir. 1986); *Grano v. Barry*, 783 F.2d 1104, 1112 (D.C. Cir. 1986). The rulings by the other courts were specifically called to the attention of the Eleventh Circuit, but it nonetheless refused to explain its rationale. Other circuits routinely issue full explanations on Rule 38 motions, *see, e.g.*, *Finch v. Hughes Aircraft Co.*, 926 F.2d 1574, 1579 (Fed. Cir. 1991), *Helmon Co. (V.I.) Inc. v. Hyatt Int'l Inc.*, 899 F.2d 250 (3rd Cir. 1990), and there is no reason why the Eleventh Circuit should not be compelled to do the same. Indeed, the Federal Circuit now requires *appellees* who move under Rule 38 to accompany assertions that an appeal is frivolous "by citation to the opposing brief and record below, and clear argument as to why those citations establish the allegedly frivolous nature of the appeal." *Brodex Corp. v. Loredin Biomedical Inc.*, 946 F.2d 850, 863 (1991).

The necessity for an explanation in these circumstances has recently been recognized by the Advisory Committee on Civil Rules in proposing an amendment to Rule 11, which is the District Court analog of Rule 38 relied on here. That amendment, which will essentially codify the prevailing practice regarding sanctions, except apparently in the Eleventh Circuit, is now pending before the Standing Committee on Rules and Practice. It provides as follows:

> When imposing sanctions, the court *shall* describe the conduct determined to constitute a violation of those rules and explain the basis for the sanction imposed. (Emphasis added).

That requirement is important not only because it assures that the court gives adequate consideration to the issue of sanctions, but because, without it, it is impossible to know whether the sanctioning court made erroneous rulings of law, which are subject to plenary review, *Cooter & Gell, supra*, 496 U.S. at 405, or whether it abused its discretion.

In short, if a district judge had imposed Rule 11 sanctions in the manner done here, especially where the fees sought are $400,000, an appeals court would have to summarily reverse in order to obtain an explanation for the ruling. This Court should do no less when it is a Court of Appeals that makes the sanctioning decision.

2. Ordinarily, the proper remedy for a failure to explain a sanctions ruling would be a remand for a full statement of reasons. But this is not an ordinary case because the Eleventh Circuit has refused not once, but twice to do what the law so clearly requires. The first time it took over seven months after all the briefs were in to reach its decision -- conveniently waiting until this Court had denied certiorari on the prior Rule 11 petitions before acting. The second refusal came in response to a petition for rehearing that left no doubt about the extent of the Court's obligation to explain. And rather than deciding the amount of a reasonable fee for the work done in the Court of Appeals, the panel simply handed the problem back to the District Court, which had not read the briefs,

heard the argument, or written the opinion rejecting the two appeals.

Presumably, faced with an order from this Court to explain its rationale, the Court of Appeals would provide some stated reasons for the result that it had already reached. Doubtless, it would be clothed with discretion-exercising phrases, such as "after giving careful consideration to all arguments raised by appellants" or "having reviewed the claims made on these appeals in great detail," or, "based on all of the factors in this case, we are left with the firm conviction that the appeals were frivolous." But after that, petitioners would again return to this Court, arguing that these "explanations" were nothing more than after-the-fact attempts to justify an award of sanctions that had already been made for different, but unstated and quite possibly improper reasons. Thus, the principal result of a remand would not be insight, but delay and more expense in a case that was decided on the merits in the District Court more than four years ago.

There is another reason why a remand would not help ultimately resolve this issue. Although petitioners recognize that the sanctions determination is a discretionary one, there are limits to that discretion, and petitioners contend that, based on a number of undisputed facts in this record, the conclusion that both appeals were "frivolous" under Rule 38, cannot, as a matter of law, be sustained. What makes those undisputed facts so significant is that they are based on the conduct of respondents, who sought the sanctions, and the Court of Appeals, which awarded them. Especially when taken together, they are, in essence, an admission that the appeals were not frivolous. Consider the following:

A. There were two consolidated appeals, which were briefed separately. Respondents were defending rulings on, respectively, the propriety of granting summary judgment under Rule 56, and an award of sanctions under Rule 11, on which the District Court had written published opinions. Yet, on the summary judgment appeal, petitioners filed a brief of 59 pages, and respondents' opposing brief was more than 85 pages, which is 70% more than the maximum allowed by Rule 28(g) of the Federal Rules of Appel-

late Procedure. On the Rule 11 appeal, the two opening briefs submitted by petitioners totaled approximately 100 pages, and again respondents answered with a brief of more than 85 pages, just to defend an allegedly frivolous appeal. One shudders to think at the length of respondents' briefs if they believed that they had to respond to difficult issues, rather than the allegedly frivolous claims made by petitioners.

B. Not only were respondents' briefs lengthy, but the time spent on them, according to affidavits that they submitted with their fee applications, was staggering for any appeal, particularly for those alleged to be frivolous. While several of the affidavits are unclear in places, petitioners asserted below (Pet. App. 29a-30a), and respondents never challenged the claim, that respondents allegedly spent 1150 hours defending the summary judgment ruling, 1190 hours on the sanctions appeal, and 210 hours preparing for and delivering the oral arguments for both appeals, for a total of approximately 2550 hours. Moreover, respondents' attorneys had handled the case in the District Court, and so there was no need for familiarizing themselves with the facts or the law. Furthermore, the issues presented primarily involved the application of principles of law to the facts of this case, all of which were briefed and argued below by their lawyers on these appeals. To spend 2550 hours on any two appeals, which amounts to more than 49 billable hours per week for an entire year, is a tremendous investment of time that can only be justified where the questions presented are of the utmost significance and difficulty, hardly the mark of frivolous appeals.

C. The Eleventh Circuit hears oral argument in only about 50% of the cases decided on the merits (Pet. App. 30a). Yet here the Court ordered oral argument, and the panel gave an extensive opportunity for both sides to present their positions, precisely the opposite of what the Court would have done if the appeals were frivolous.

D. Nor did the panel summarily affirm the rulings below. Instead, it issued a full opinion, which has been published, which occur in only about 31% of the cases the Eleventh Circuit decides. *Id.* While rejecting petitioners' arguments on the merits, the

opinion never suggested that any of them, let alone all of them, were frivolous. As the opinion makes clear, this was not a situation in which a single case or statute plainly controlled the outcome of any issue. Rather, it was one where the outcome was determined by the application of the facts to the governing legal principles. *See Andros Compania Maritima S.A. v. Marc Rich & Co.*, 579 F.2d 691, 704 n.20 (2d Cir. 1978) ("We cannot in good conscience characterize as 'frivolous' an appeal that has provoked so extended an affirmance as the one just concluded"). Presumably, if the Court of Appeals found these cases to be frivolous, it would, if asked, make similar findings for all the cases in which oral argument was not granted, or in which no published opinion was issued, as well as many others, like this, in which both criteria for non-frivolousness would seem to have been met.

E. After the decisions on these two appeals, petitioners filed for review in this Court, limiting themselves to the sanctions issues. In order to answer what they now claim were frivolous arguments, respondents not only required 25 printed pages, but they also needed an extra 30 days to prepare their opposition.

Under Rule 38, a court has considerable leeway in deciding whether legal arguments are frivolous and not within the bounds of reasonable advocacy. But there are plainly limits on the extent to which courts can, in effect, second-guess parties and tell them that their arguments are not simply wrong, but unreasonably so. *Toscano v. Chandries S.A.*, 934 F.2d 383, 387 (1st Cir. 1991)(courts should "never impose sanctions lightly"); *Hilmon Co. (V.I.) Inc. v. Hyatt Int'l Inc.*, 899 F.2d 250, 253 (3d Cir. 1990)(courts should be "reluctant" to impose sanctions). As the courts have recognized, not every losing appeal, even one involving only "long shots," is frivolous, *Meredith v. Navistar Inter. Trans. Co.*, 935 F.2d 124, 129 (7th Cir. 1991), or else we would have the English, not the American rule in the federal courts. This case dramatically presents the question of what those limits are and will enable the Court to set forth the objective factors that will guide the lower courts, or at least set the outer parameters beyond which sanc-

tions may not be imposed for allegedly frivolous appeals.[2]

There is another aspect of the sanctions award that merits this Court's attention. Nowhere in the order did the Court of Appeals say who is responsible for paying the fees that will be awarded. Is it the original clients in the District Court who were appellants in the Court of Appeals? Is it the original lawyers in the District Court who were appellants in the Court of Appeals, but only on the sanctions issue? Or is it someone else? The Court of Appeals was asked these questions on rehearing (Pet. App. 31a), but it refused even to say who was responsible, let alone on what basis.

Apparently, the Court assumed that lawyers and clients alike are jointly responsible for all frivolous appeals, regardless of the circumstances or reasons for deciding that the appeal is frivolous. Yet, at least in the context of the analogous provisions of Rule 11, the courts have generally taken a fault-based approach, imposing sanctions only on persons whose conduct is found to have been wrongful, improper, or unreasonable. *White v. General Motors Corp.*, 908 F.2d 675, 683 (10th Cir. 1990); *Borowski v. Du Puy*, 850 F.2d 297, 305 (7th Cir. 1988)(collecting cases). Indeed, since the Court of Appeals relied solely on Rule 38, unless it found serious fault on the part of the persons who were sanctioned, or the sanction was tied to a discrete event, as opposed to the entire appeal, there would be a very serious problem with engaging in wholesale fee-shifting in light of the limitations in the Rules Enabling Act, 28 U.S.C. § 2072. *See Business Guides Inc. v. Chromatic Comm. Enter. Inc.*, 111 S. Ct. 922, 933-34 (1991).

---

[2] Among the objective factors that would signify a frivolous appeal are the following: legal arguments previously rejected in very same case, *Constant v. United States*, 929 F.2d 654, 658 (Fed. Cir.), *cert. denied*, 111 S. Ct. 2799 (1991); direct Supreme Court and circuit precedent on point, with no effort to respond to lower court's explanation of the law, *Williams v. United States Postal Service*, 873 F.2d 1069, 1075 (7th Cir. 1989); persisting in appeal over amount of supersedeas bond, after opposing party has made appeal moot by collecting full amount of judgment, *Sun-Tek Industries v. Kennedy Sky Lites, Inc.*, 856 F.2d 173, 177 (Fed. Cir. 1988); and absence of *any* argument as to dismissal of individual defendants, with appeal based solely on request of client, *McConnell v. Critchland*, 661 F.2d 116, 118 (9th Cir. 1981).

The impact of what is essentially an absolute liability on petitioners in this case is particularly egregious with respect to the sanctions appeal. After all, can any reasonable individual, lay person or attorney, be expected to accept the judgment of a single district judge that their conduct was so improper as to require the payment of $1.2 million in fees, or must they run the risk that, if their argument is rejected, further attorneys' fees will be more or less automatically imposed? Other Courts of Appeals have not, to our knowledge, taken so draconian a view of imposing sanctions on clients, and several have refused to do so when the lawyer was to blame. *See e.g. Hilmon Co. (V.I.) Inc. v. Hyatt Int'l, Inc.*, 899 F.2d 250, 253-54 (3d Cir. 1990); *Sun-Tek Industries Inc. v. Kennedy Sky Lites Inc.*, 856 F.2d 173, 177 (Fed. Cir. 1988); *Hill v. Norfolk & Western Railway Co.*, 814 F.2d 1192, 1201 (7th Cir. 1987); and *Acevedo v. INS*, 538 F.2d 918, 921 (2d Cir. 1976). Accordingly, this Court should grant review to correct this aspect of the Rule 38 sanctions decision as well.[3]

---

[3] The proposed amendment to Rule 11 would also make it clear that only lawyers are responsible for frivolous legal arguments. Because there is no pending proposal to amend Rule 38, the issue of who is responsible would remain open even if the change to Rule 11 is adopted. Moreover, the lack of objective standards for deciding when legal arguments are frivolous would continue under both Rule 38 and Rule 11.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Alan B. Morrison
(Counsel of Record)
David C. Vladeck
Paul Alan Levy

Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036
(202) 833-3000

Attorneys for Petitioners Tony Avirgan and Martha Honey

June 25, 1992

Filed February 26, 1992

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

TONY AVIRGAN, et al.	)	
	)	
Plaintiffs-Appellants,	)	
	)	
v.	)	Cases Nos. 88-5720, 89-5143
	)	89-5232 & 89-5515
JOHN HULL, et al.,	)	
	)	
Defendants-Appellees.	)	

On Appeal from the United States District Court
for the Southern District of Florida

BEFORE: HATCHETT and BIRCH, Circuit Judges, and RONEY, Senior Circuit Judge.

BY THE COURT:

We find that the appeals in these cases were frivolous, accordingly:

Appellees' Hull, Calero, Owen, Singlaub, Martin, McCoy, Delamico, Shackley, Secord and Gonzalez motions for attorneys' fees are GRANTED, and this matter is REMANDED to the district court for an evidentiary hearing to determine a reasonable fee.

Appellants' Avirgan, Honey, Sheehan and The Christic Institute motions for a hearing on the Issue of attorneys' fees in

this court, under Rule 38, is DENIED.

Appellants' alternative motions for leave to file post-entitlment submissions, requesting leave to file responses to appellee's motions for attorneys' fees is DENIED.

[Filed June 18, 1991]

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Tony AVIRGAN and Martha Honey,
Plaintiffs-Appellants,

v.

John HULL, Adolfo Calero, Robert Owen, John K. Singlaub, Ronald Joseph Martin, Sr., James McCoy, Rafael "Chi Chi" Quintero, Mario Delamico, Thomas Clines, Theodore Shackley, Albert Hakim, and Richard Secord,
Defendants-Appellees,

Bruce Jones, et al.,
Defendants.

Tony AVIRGAN and Martha Honey,
Plaintiffs-Appellants,

v.

John HULL, Moises (Dagoberto) Nunez, Jorge Gonzalez, Adolfo Calero, Robert W. Owen, Thomas Posey, John K. Singlaub, Ronald Joseph Martin, James McCoy, Rafael "Chi Chi" Quintero, Mario Delamico, Thomas Clines, Theodore Shackley, Albert Hakim and Richard Secord,
Defendants-Appellees,

Rene Corbo, et al.,
Defendants.

Tony AVIRGAN and Martha Honey,
Plaintiffs-Appellants,

Daniel P. SHEEHAN and The Christic Institute,
Non-Party-Appellants,

v.

John HULL, Moises (Dagoberto) Nunez, Jorge Gonzalez, Adolfo Calero, Robert Owen, John Singlaub, James McCoy, Ronald Joseph Martin, Sr., Rafael "Chi Chi" Quintero, Mario Delamico, Thomas Clines, Theodore Shackley, Richard Secord, and Albert Hakim,
Defendants-Appellees,

Rene Corbo, et al.,
Defendants.

Tony AVIRGAN and Martha Honey,
Plaintiffs-Appellants,

Daniel P. SHEEHAN and the Christic Institute,
Non-Party-Appellants,

v.

John HULL, Moises (Dagoberto) Nunez, Jorge Gonzalez, Adolfo Calero, Robert W. Owen, Thomas Posey, John Singlaub, James McCoy, Ronald Joseph Martin, Sr., Rafael "Chi Chi" Quintero, Mario Delamico, Thomas Clines, Theodore Shackley, Richard Secord, and Albert Hakim,
Defendants-Appellees,

Rene Corbo, et al.,
Defendants.

Nos. 88-5720, 89-5143, 89-5232
and 89-5515.

Appeals from the United States District Court for the Southern District of Florida.
(D.C. No. JLK-CIV-86-1146)

Michael W. Burnbaum, Coral Gables, Florida; Raul de Cubas of Diaz Silviera and Associates, Coral Gables, Florida; Robert F. Garcia-Esquerro, Miami, Florida; Thomas C. Green and Paul Castellitto of Green & Lankford, Washington, D.C.; Leonard Greenbaum and Thomas Hylden of Sachs, Greenbaum & Taylor, Washington, D.C.; Theodore Klein of Fine, Jacobson, Schwartz, Nash, Block & England, Miami, Florida; Luis S. Konski of Walton, Lantaff, Schroeder & Carson, Miami, Florida; Jack McKay and Jane Sullivan of Shaw, Pittman, Potts & Trowbridge, Washington, D.C.; Joseph Portuondo of Fitzgerald, Portela & Portuondo, Miami, Florida; Edwin R. Smith, Evansville, Indiana; Thomas R. Spencer of Spencer, Bernstein, Seeman & Klein, Miami, Florida; for Defendants-Appellants.

Eugene R. Scheiman, New York, New York; Daniel P. Sheehan of the Christic Institute, Washington, D.C. (Phil Hirschkop, Alexandria, Virginia; Joanne Royce and Lanny Sinkin of the Christic Institute, Washington, D.C., with them on the briefs) for Plaintiff-Appellees.

Eugene R. Scheiman, New York, New York; (Joanne Royce and Lanny Sinkin of the Christic Institute, Washington, D.C., with him on the briefs) for Appellee the Christic Institute.

Morton Stavis of Center for Constitutional Rights, New York, New York (Joan Gibbs, Katherine Gorove, and Stephanie Y. Moore of Center for Constitutional Rights, New York, New York with him on the briefs) for Appellee Daniel

P. Sheehan.

Before HATCHETT and BIRCH, Circuit Judges, and RONEY, Senior Circuit Judge.

HATCHETT, Circuit Judge:

Two journalists, their lawyers, persons and entities associated with the journalists and lawyers, in this consolidated appeal involving the Nicaraguan Contra affair, seek reversal of the district court's orders granting summary judgment against them and imposing sanctions in excess of one million dollars. We affirm the district court.

FACTS

On May 30, 1984, Tony Avirgan and his wife, Martha Honey, appellants, who are American journalists based in Costa Rica and cover Central America for various news agencies, attended a press conference of Contra leader Commandant Eden Pastora at the campground of the Southern Contra Force in La Penca, Nicaragua. About thirty journalists traveled to the guerilla campground. At the press conference, a bomb exploded killing eight people and wounding numerous others. Avirgan and Honey allegedly suffered personal injuries, damages to television camera equipment, loss of business due to the bombing, and loss of consortium. Avirgan and Honey claim that the bombing was the product of a criminal racketeer influenced and corrupt organization (RICO) enterprise consisting of the appellees

with the goal of overthrowing the government of Nicaragua.[1] The appellees include alleged Central Intelligence Agency operatives, military intelligence personnel, arm merchants, mercenaries, and Colombian drug lords. Most of the allegations are based geographically in Nicaragua, but some allegations accuse various appellees of anti-communist operations in Cuba, Southeast Asia, Iran, Libya.

Chief Judge James Lawrence King, in his thorough opinion, summarized Avirgan and Honey's theory of their case as follows:

> It is the theory of plaintiffs' case that the defendants established an enterprise, the purpose of which was to violate the principles espoused in the Neutrality Act and that all of the alleged patterns of racketeering activity were performed to promote the goal of this enterprise. Central to the alleged violations of each subsection of § 1962 is the plaintiffs' purported Neutrality Act enterprise. The plaintiffs allege that in May, 1983 the defendants

---

[1] The status of persons involved in these cases is as shown below:
Appellants: Tony Avirgan (Plaintiff), Martha Honey (Plaintiff), The Christic Institute, and Daniel P. Sheehan.
Appellees: John Hull, Moises Dagoberto Nunez, Jorge Gonzalez, Adolfo Calero, Robert W. Owen, John K. Singlaub, Ronald Joseph Martin, Sr., James McCoy, Thomas Posey, Rafael Quintero, Mario Delamico, Thomas Clines, Theodore Shackley, Albert Hakim, and Richard Secord.
Defendants only: Bruce Jones, Rene Corbo, Francisco Chanes, Ricardo Gris, William Gris, Robert P. Pallais, Hector Cornillot, and Frederico Saenz.
Named as defendants but not served: Felipe Vidal Santiago, Ramon Cecilio Palacio, Amac Galil, Alvaro Cruz, Pablo Escobar, and Jorge Ochoa.

Francisco Chanes, Moises Nunez, Hector Cornillot, Rene Corbo and Felipe Vidal Santiago established an enterprise. The purpose of the enterprise was to launch a Cuban/American mercenary expeditionary force against the Republic of Nicaragua, from Costa Rica, along the 'Southern Front.'

The plaintiffs also contend that these defendants established a cocaine smuggling operation through Costa Rica to finance the workings of this enterprise in violation of the Neutrality Act. 18 U.S.C. § 960 (1986). It is asserted that the original purpose of these individuals was to assist an indigenous Nicaraguan group, the Revolutionary Democratic Alliance ('ARDE').

The ARDE was engaged in guerilla attacks against Nicaragua under the leadership of Eden Pastora. The plaintiffs maintain that sometime after this original joinder of forces the enterprise decided to remove Pastora as leader of ARDE in order to merge ARDE into alliance with the Honduras based contra group, the Nicaraguan Democratic Force ('FDN') and facilitate its narcotics trafficking in Costa Rica.

Avirgan v. Hull, 691 F.Supp. 1357, 1363-64 (S.D.Fla.1988).

PROCEDURAL HISTORY

On May 29, 1986, Avirgan and Honey filed a complaint in the United States District Court for the Southern District of Florida. Avirgan and Honey's racketeering allegations include the following: the attempted murder of Eden Pastora; the murder of eight persons at the press conference in La Penca; the attempted murder of Avirgan at the La Penca bombing; the trafficking of arms and explosives in violation of state and federal law; the transferring of funds from illegal weapons and explosives dealings; the conspiracies to murder Pastora on two occasions; the conspiracy to kidnap

informants - Carlos Rojas Chinchilla and a person identified only as "David"; the murder of David; the conspiracy to transport cocaine into the United States; and the conspiracy to murder the United States Ambassador to Costa Rica. The primary allegation, however, is that Amac Galil, disguised as a journalist named Per Anker Hansen, detonated the bomb at the La Penca press conference, and acted in concert with the twenty-eight other persons named in the amended complaint.

Avirgan and Honey also allege state law claims which include: battery, loss of consortium, assault, intentional infliction of mental distress, trespass, damage to personal property, and a state RICO claim under Fla.Stat.Ann. § 895.03.

In their amended complaint, Avirgan and Honey specified the relevant time period as May, 1983, through May 29, 1986. Thus, for discovery purposes, the court granted the time limit specified plus six months before the first alleged overt act, which occurred in May, 1983. The district court limited discovery to a four-year period covering the relevant alleged conspiratorial time period of December, 1982, until November, 1986. The district court also limited the subject matter discovery to the purchase or sale of military equipment; weapons; or explosives; transactions in illegal drugs; the operation of the alleged Neutrality Act enterprise; and any action resulting in or causing injury to Avirgan and Honey.

After two years of discovery, several appellees moved for summary judgment alleging that Avirgan and Honey had failed to state a claim under RICO. In addressing this motion, the district court thoroughly analyzed the evidence Avirgan and Honey presented, in order to determine whether they had shown genuine issues of material fact. Finding

much of the evidence inadmissible, the district court ruled that Avirgan and Honey failed to prove that the appellees were the proximate cause of their injuries and granted appellees' motions for summary judgment on the federal and state law claims.[2]

The district court, by a subsequent order, granted appellees' motions for costs and attorney's fees, ruling that the abuse of the judicial process required that Avirgan and Honey make the appellees whole by paying the fees the appellees were forced to spend in defending the lawsuit. Moreover, the district court ruled that liability for costs and fees rests jointly and severally with Avirgan and Honey, Daniel Sheehan (Avirgan and Honey's lawyer) and the Christic Institute.[3]

On appeal, this court consolidated appellants appeals of the district court's (1) grant of summary judgment; (2) the award of attorney's fees and costs; (3) motions for clarification order; and (4) the clarification order.[4]

---

[2] Avirgan and Honey do not challenge the grant of summary judgment on the state law claims. As such, we deem those claims abandoned. *Rogero v. Noone*, 704 F.2d 518, 529 n. 1 (11th Cir.1983).

[3] The Christic Institute is a tax-exempt law firm which funded the litigation.

[4] The appeal on the merits is 88-5720; the other three appeals are from the district court's orders on fees (89-5143, 89-5232, and 89-5515).

On appeal, numerous persons and entities appeared, through brief, as amicus curiae, including: Church of the Brethren, Church Women United, Conference of Major

CONTENTIONS

Avirgan and Honey contend that the district court ruled improperly in granting summary judgment, in issuing certain orders prior to summary judgment, and in denying relief for cost of injury and equipment due to the bombing. Additionally, Avirgan, Honey, the Christic Institute, and Daniel Sheehan challenge the award of costs and attorneys' fees.

The issues presented on appeal are: (1) whether the district court properly granted summary judgment on the ground that the appellants failed to show that the appellees caused their injuries; (2) whether the district court erred in issuing certain orders prior to summary judgment; and (3) whether the district court erred in awarding attorneys' fees and costs to the appellees.[5]

DISCUSSION

Superiors of Men, Peace Fellowship of the Christian Church (Disciples of Christ), Leadership Conference of Women Religious, the Maryknoll Fathers and Brothers, General Conference Mennonite Church, National Council of Churches of Christ in the U.S.A., Unitarian Universalist Association, the Womens Division of the United Methodist Board of Global Ministries; Professor Melissa Nelken, Professor Carl Tobias, Professor Mary Twitchell, Trial Lawyers for Public Justice, and Public Citizen and Alliance for Justice.

[5] Avirgan and Honey also request damages for injuries and ask that if the case is remanded for further proceedings, the proceeding not be conducted by Chief Judge James L. King. Since we affirm the district court, these issues are moot.

1. Summary Judgment

[1,2] Consideration of the district court's grant of summary judgment requires plenary review and application of the same legal standards that bound the district court. *Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1527 (11th Cir.1987). If the party seeking summary judgment meets the initial burden of demonstrating the absence of a genuine issue of material fact, the burden then shifts to the nonmoving party to come forward with sufficient evidence to rebut this showing with affidavits or other relevant and admissible evidence. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Fed.R.Civ.P. 56(e). A nonmoving party, opposing a motion for summary judgment supported by affidavits cannot meet the burden of coming forth with relevant competent evidence by simply relying on legal conclusions or evidence which would be inadmissible at trial. *Fontenont v. Upjohn Co.*, 780 F.2d 1190, 1195 (5th Cir.1986). The evidence presented cannot consist of conclusory allegations or legal conclusions. *First National Bank of America v. Cities Serv. Co.*, 391 U.S. 253, 289, 88 S.Ct. 1575, 1592, 20 L.Ed.2d 569 (1968).

A. RICO Claim

[3] Avirgan and Honey's RICO claim is founded upon 18 U.S.C. § 1964(c).[6] Thus, they must prove three essential elements: (1) a violation of section 1962; (2) injury to business or property; and (3) that the violation caused the

---

[6] Title 18 U.S.C. § 1964(c) reads as follows:
Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

injury. *O'Malley v. O'Neill* 887 F.2d 1557, 1561 (11th Cir. 1989).

> Sections 1962(a), (b), and (c) of title 18 make criminally liable those who engage in, or aid and abet another to engage in, a pattern of racketeering activity if they also do the following: invest income derived from the pattern of racketeering activity in the operation of an enterprise engaged in interstate commerce (section 1962(a)); acquire or maintain, through the pattern of racketeering activity, any interest in or control over such an enterprise (section 1962(b)); or conduct, or participate in the conduct of, the affairs of such an enterprise through a pattern of racketeering activity (section 1962(c)). Section 1962(d) makes it a crime to conspire to violate section 1962(a), (b), or (c). [Footnote omitted.]

Pelletier v. Zweifel, 921 F.2d 1465, 1495-96 (11th Cir.1991).

1. Evidence

As to the evidence Avirgan and Honey presented, the district court found:

> The plaintiffs have not made a showing of a genuine issue of material fact with respect to any of their allegations concerning the cause of their injuries. Causation is an essential element of a RICO action. Accordingly, the defendants who have moved are entitled to summary judgment.

Avirgan, 691 F.Supp. at 1377.

[4] Avirgan and Honey argue that they were not obligated to produce evidence gathered during pretrial discovery which demonstrated that Galil had committed the bombing and was

a member of the enterprise, that C-4 was an ingredient of the bomb, or that they and their news sources were threatened and had crimes committed against them. We disagree. The evidence Avirgan and Honey presented is scant, almost nonexistent, on the important issue of causation. Avirgan and Honey presented the *La Penca Report*, a publication they prepared, which concludes that Amac Galil, a/k/a Per Anker Hansen caused the bombing. The district court correctly determined that this evidence was inadmissible.

Also, Avirgan and Honey submitted a one-page translation of a five-page document the Costa Rican OIJ prepared. The OIJ, according to Avirgan and Honey, is the Costa Rican equivalent to the United States Federal Bureau of Investigation (FBI). The translation is uncertified, unsigned, and does not conclude that Galil was responsible for the bombing. It merely concludes that debris found at the sire of the bombing matched that of a box Galil carried. This evidence is circumstantial, speculative, and of little weight.

Avirgan and Honey further argue that because none of the appellees disputed Galil's role in the bombing, summary judgment was improper. According to Avirgan and Honey, although some appellees claim that they did not know Amac Galil or have direct or indirect contact with him, this does not mean that all of the appellees are unassociated with the enterprise. In other words, Avirgan and Honey argue that no one has disproved Galil's existence, or disproved the existence of the enterprise, or disproved Galil's association with the enterprise. Thus, say Avirgan and Honey, the enterprise existed; Galil existed; Galil set off the bomb; and we were injured.

[5] Avirgan and Honey note that this circuit has ruled that a RICO enterprise may be an "amoeba-like" structure or a loose informal association. See *United States v. Cagnina*, 697

F.2d 915, 921 (11th Cir.1983), *cert. denied*, 464 U.S. 856, 104 S.Ct. 175, 78 L.Ed.2d 157 (1983). We have so held. Nevertheless, Avirgan and Honey presented no evidence to indicate that Galil committed the bombing or was a part of the alleged enterprise. No admissible evidence was ever produced to show that Galil even existed.[7] The evidence completely failed. Galil was never served with a complaint or scheduled for deposition. All parties realized that responsibility for the La Penca bombing was a key issue on summary judgment. Yet, Avirgan and Honey, after years of discovery, brought forth nothing on the causation issue.

[6] Likewise, without submitting admissible evidence, Avirgan and Honey alleged that the appellees were liable for threats to and the kidnapping of Carlos Rojas Chinchilla and the murder of "David." According to Avirgan and Honey, Chinchilla and David served as their informants about the bombing. They specifically named Hull, Jones, Corbo, Vidal, Chanes, Nunez, Cruz, Saenz, Posey, Owen, and Palacio as participants in the crimes against David and Carlos, both individually and through agents. Avirgan and Honey assert that only three appellees, Hull, Owen, and Jones, moved for summary judgment.[8] They argue that Owen was in Central

---

[7] At one point, Avirgan and Honey argue that Theodore Shackley's counsel admitted Galil's existence. Shackley's counsel's statement was, "I don't believe that the plaintiffs have any proof that any of the defendants was engaged in the La Penca bombing or connected to the La Penca bombing other than this fellow that they describe as Amac Galil." This statement is not evidence that counsel admitted Galil's alleged role in the bombing.

[8] The following persons filed motions for summary judgment: Jones, Owen, Hull, Calero, Singlaub, Shackley, Martin, McCoy, Quintero. Delamico, Clines, Hakim, and

America at the time of an execution of a "Sandinista informant" believed to be David. According to Avirgan and Honey, it was Owen's responsibility to demonstrate that the executed Sandinista informant was not David, or prove that he had no knowledge of, or did not condone the execution. It is their theory that the omission of this evidence, which Owen did not produce, should serve as a favorable inference for them. *Lampkin v. Liberia Athene Transport Co., Ltd.*, 823 F.2d 1497, 1499 (11th Cir.1987). This absence of evidence does not result in a favorable inference.

Avirgan and Honey further contend that Hull, Jones, Corbo, Vidal, Chanes, Nunez, Cruz, Saenz, Posey, and Owen threatened to murder them because they connected Hull and Vidal to the threats against their family. Again, theories, allegations, and speculation; but, no evidence.

2. Causation

[7] In a civil RICO action, the plaintiff must prove that the criminal conduct in violation of section 1962 directly or indirectly injured the plaintiff's business or property. *Haroco v. American Bank and Trust Co. of Chicago*, 747 F.2d 384, 398 (7th Cir.1984), *aff'd*, 473 U.S. 606, 105 S.Ct. 3291, 87 L.Ed.2d 437 (1985).

Secord. Gonzalez filed an untimely summary judgment motion.

Defendants Santiago, Palacio, Galil, Cruz, Escobar, and Ochoa were never served and were dismissed.

Nine defendants did not move for summary judgment: Corbo, Nunez, Chanes, R. Gris, W. Gris, Pallais, Cornillot, Saenz, and Posey. Nunez moved, after the pretrial conference, to vacate the entry of default against him and to quash the service of process.

[8] Avirgan and Honey emphasize that the district court was required to provide them with notice of its intention to consider the causation issue, and it did not do so. We reject this argument. Appellees' numerous summary judgment motions presented the causation issue. For example, Owen's summary judgment motion asserted that no evidence supported the theory that Galil was linked to the bombing or to the alleged enterprise. In this motion, Owen also challenged whether any evidence supported the kidnapping of Chinchilla, the kidnapping and threatening of David, the threats to murder (Chinchilla, David, Avirgan, Honey), and the attempted assassination of Pastora.

In practically every motion for summary judgment, the appellees asserted that they had no involvement, directly or indirectly, in the La Penca bombing, that they were not the cause of any of the injuries, and that they were not and had never been members of an alleged enterprise. The appellees' affidavits, answers to interrogatories, and depositions put Avirgan and Honey on notice that causation was a principal issue. Consequently, the district court acted properly in granting summary judgment on the ground that Avirgan and Honey failed to prove that the appellees caused the injuries.

[9] Avirgan and Honey's additional allegation is that Galil used C-4 explosives in the La Penca bombing. For this assertion, they rely upon the deposition of Fernando Cruz Castro. The district court found that Avirgan and Honey evidently asked Cruz Castro to recall a letter or some other writing which suggested that Per Anker Hansen (Galil) committed the La Penca bombing. Cruz Castro's affidavit seeks to recite the contents of the letter or other writing from memory. The district court found, and we agree, that Cruz Castro's affidavit was not admissible. No other evidence linked Galil or any appellee to C-4 explosives.

B. Discovery

Avirgan and Honey also contend that the district court erred in granting summary judgment because the appellees had not complied with discovery requests or the court's orders compelling discovery. The record does not support this contention. All appellees, except Corbo, submitted affidavits, answered interrogatories, and/or provided sworn depositions denying responsibility, directly or indirectly, for the La Penca bombing. Owen, Singlaub, and Calero gave lengthy and complete depositions; Hull and Secord gave incomplete depositions because of Avirgan and Honey's delay in setting dates; Posey, Quintero, and Hakim invoked their fifth amendment privilege; Shackley and Clines were never noticed for deposition. All appellees served with interrogatories responded, and all appellees who moved for summary judgment submitted sworn affidavits. Furthermore, Avirgan and Honey had the benefit of public information generated by the Iran/Contra affair, including the extensive testimony of Secord, Hakim, Owen, Singlaub, Calero, and numerous other witnesses in public hearings.

[10] In this RICO proceeding which involves some alleged criminal activity, Avirgan and Honey should have anticipated that some appellees would impose their fifth amendment rights. Invocation of the amendment privilege did not give rise to any legally cognizable inferences sufficient to preclude entry of summary judgment. The negative inference, if any, to be drawn from the assertion of the fifth amendment does not substitute for evidence needed to meet the burden of production. *United States v. Rylander*, 460 U.S. 752, 103 S.Ct. 1548, 75 L.Ed.2d 521 (1983). Most importantly, Avirgan and Honey did not demonstrate that further discovery would have led to evidence which would have precluded summary

judgment based on causation.[9]

II. Orders Prior to Summary Judgment

[11] Avirgan and Honey also contend that the district court erred in the issuance of orders prior to summary which restricted discovery and denied them the right to file a third amended complaint. We review these claims under an abuse of discretion standard. *Edward Leasing Corp. v. Uhlig and Associates, Inc.*, 785 F.2d 877 (11th Cir.1986).

A. Discovery Limitations

Avirgan and Honey contend that the district court's order restricting discovery to evidence for the period 1983 through 1986 of only one venture of the alleged RICO enterprise, and only those subjects related to the La Penca bombing, deprived them of an opportunity to conduct adequate discovery.

[12] Despite these assertions, prior to filing the first complaint, Avirgan and Honey boasted of a two-year investigative period, and after filing enjoyed an additional two years of discovery. Where a significant amount of discovery has been obtained, and it appears that further discovery would not be helpful in resolving the issues, a request for further discovery is properly denied. *Aviation Specialties, Inc.*

---

[9] Avirgan and Honey had two years to conduct discovery and seven and one-half months advance warning of the discovery cut-off date. Knowing this, they took absolutely no discovery during the first nine months after filing the case and little more until January, 1988. During the final 4 1/2 months of discovery, Avirgan and Honey filed 153 deposition notices. It is clear that Avirgan and Honey's actions caused delay in discovery, not the appellees.

v. United Technologies Corp., 568 F.2d 1186, 1189 (5th Cir.1978).

[13] Thus, the time and subject matter restrictions imposed by the district court did not deprive Avirgan and Honey of an opportunity to conduct adequate discovery. Moreover, the order did not prohibit discovery into causation, which was the dispositive issue. The district court has wide discretion in determining the scope and effect of discovery, and it did not abuse its discretion when it imposed time and subject matter restrictions in this case. *See Amey, Inc. v. Gulf Abstract and Title, Inc.*, 758 F.2d 1486, 1505 (11th Cir.1985), *cert. denied*, 475 U.S. 1107, 106 S.Ct. 1513, 89 L.Ed.2d 912 (1986).

B. Third Amended Complaint

[14] Avirgan and Honey also challenge the district court's denial of their motion to file a third amended complaint. Avirgan and Honey acknowledge that the third amended complaint would not have altered the claims against the appellees or added new parties, causes of action, or additional relief. Consequently, a third amended complaint was unnecessary. Avirgan and Honey needed proof, not more pleadings. The district court did not abuse its discretion in denying the filing of a third amended complaint.

III. Attorneys' Fees

In its order awarding costs and attorney's fees, the district court stated:

> The attorneys for the plaintiffs, The Christic Institute, must have known prior to suing that they had no competent evidence to substantiate the theories alleged in their complaint. Plaintiffs' lead counsel, Daniel Sheehan,

supplemented the complaint with a detailed affidavit outlining the purported testimony of seventy-nine witnesses who Mr. Sheehan stated had factual knowledge that these defendants set and exploded the bomb that caused plaintiff's injuries.

The seventy-nine witnesses were identified only by number. Plaintiffs' counsel refused to identify the names and addresses of the vast majority of the seventy-nine witnesses until ordered to do so by the court. Plaintiffs appealed the order requiring them to disclose the identities of the witnesses. These actions by plaintiffs and their counsel prevented the defendants from taking depositions of these witnesses, and delayed orderly discovery for many months.

After all the appeals were exhausted and plaintiffs complied with the order to reveal the names of their witnesses, the reason for the plaintiffs' adamant refusal became apparent. Specifically, the names and identities of approximately twenty of the seventy-nine witnesses were totally unknown to Mr. Sheehan or the plaintiffs. Several of the disclosed witnesses later stated under oath that they did not know Mr. Sheehan, had never spoken to him, or flatly denied the statements he had attributed to them in his affidavit. The remaining witnesses did not furnish any statements that would be admissible. Much of the testimony of these witnesses involved conversations they allegedly had with other people, which is the hearsay testimony inadmissible at a trial.

Avirgan v. Hull, 705 F.Supp. 1544, 1545 (S.D.Fla.1989). Avirgan and Honey do not dispute the district court's statements. The other appellants, in the fee portion of the case, do not dispute the statements.

The district court awarded costs to the appellees pursuant to Federal Rule of Civil Procedure 54(d), and 28 U.S.C. § 1920, which lists the items that may be reimbursed as costs.[10] Avirgan and Honey argue that what the attorneys "must have known" is not the proper standard for the grant of attorneys' fees, but is the standard for the imposition of sanctions. Thus, in their opinion, the district court impermissibly "guised its Rule 11 sanctions as a grant of summary judgment."

Sheehan could not have reasonably believed at the time of the filing of the complaint and the signing of the affidavit

---

[10] Federal Rule of Civil Procedure 54(d) provides in pertinent part:

> Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs.
>
> Title 28 U.S.C. § 1920 provides:
>
> Taxation of costs
>
> A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal:
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title;
>
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

that the complaint was well-grounded in fact.[11] Particularly is this true of the affidavit with its unknown, nonexistent, deceased sources, its fabricated testimony, and the deceptive style used to mask its shortcomings. It is obvious that if the appellants knew (must have known) prior to filing this lawsuit that they had no competent evidence, then, this complaint was not well-grounded. Additionally, the district court stated in its order granting attorney's fees and costs that Sheehan's affidavit was the impetus for the two years of discovery. Yet, this discovery did not yield any witnesses who could link the alleged criminal enterprise to the bombing.

[15,16] In its clarification order, the district court explained that Daniel Sheehan, as lead counsel, and the

---

[11] Federal Rule of Civil Procedure 11, in pertinent part provides:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Christic Institute, as the official law firm, were liable pursuant to the bad-faith exception, 28 U.S.C. § 1927, and Federal Rule of Civil Procedure 11, while Avirgan and Honey, as willful participants in Sheehan's litigation strategy, were liable under the bad-faith exception.[12] 125 F.R.D. 189. A court may assess attorney's fees against litigants, counsel, and law firms who willfully abuse judicial process by conduct tantamount to bad faith. *Roadway Express Inc. v. Piper*, 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980). On this record, we have no difficulty in finding that these appellants unreasonably and vexatiously multiplied these proceedings.[13] It is well established that:

> Although a litigant proceeding in good faith has a right to use civil discovery in attempts to prove the existence of a colorable claim for relief, filing a lawsuit is not a gratuitous license to conduct infinite forays in search of evidence. When it becomes apparent that discoverable evidence will not bear out the claim, the litigant and his attorney have a duty to discontinue their quest.

Collins v. Walden, 834 F.2d 961, 965 (11th Cir.1987). Since

---

[12] Title 28 U.S.C. § 1927 provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

[13] At oral argument, appellants admitted they had spent more than $2 million on this case although, under the best scenario, they did not expect to collect half that amount.

Sheehan, the Christic Institute, Avirgan, and Honey chose not to abandon this case, the district court properly awarded attorney's fees and costs to the appellees.

[17] Furthermore, the district court's order does not infringe upon the appellants' right of access to the courts, or first amendment rights of free association, or Sheehan's professional obligation to represent clients zealously. Status as a public interest law firm or the nature of a claim does not confer immunity from attorneys' fees for bringing and maintaining frivolous lawsuits. *See Roadway Express*, 447 U.S. at 762, 100 S.Ct. at 2462; *Oliveri v. Thompson*, 803 F.2d 1265, 1280 (2d Cir. 1986). Accordingly, we affirm the district court's award of attorney's fees and costs.

CONCLUSION

Accordingly, we affirm the judgments of the district court.

AFFIRMED.

File April 29, 1992

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

TONY AVIRGAN, et al.	)	
	)	
Plaintiffs-Appellants,	)	
	)	
v.	)	Cases Nos. 88-5720, 89-5143
	)	89-5232 & 89-5515
JOHN HULL, et al.,	)	
	)	
Defendants-Appellees.	)	

On Appeal from the United States District Court for the Southern District of Florida

---

BEFORE: HATCHETT and BIRCH, Circuit Judge, and RONEY, Senior Circuit Judge.

BY THE COURT:

Appellants' Avirgan, Honey, Sheehan and The Christic Institute motion for rehearing of the February 26, 1992 order granting appellees' Hull, Calero, Owen, Singlaub, Martin, McCoy, Delamico, Shackley, Sewcord and Gonzalez motions for attorneys' fees is **DENIED**.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

TONY AVIRGAN, et al.,	)	
	)	
Plaintiffs-Appellants,	)	
	)	
v.	)	Cases Nos. 88-5720, 89-5143
	)	89-5232 & 89-5515
JOHN HULL, et al.,	)	
	)	
Defendants-Appellees.	)	

PETITION FOR REHEARING

Pursuant to Rule 40 of the Federal Rules of Appellate Procedure, this petition seeks rehearing by the panel only of the order entered February 26, 1992, granting appellees' motion for attorneys' fees under Rule 38. A copy of that order is attached. That order also remanded the case to the district court "for an evidentiary hearing to determine a reasonable fee," and it denied appellants' motion for an evidentiary hearing in this Court, as well as their alternative motion "to file post-entitlement submissions, requesting leave to file responses to appellee's [sic] motions for attorneys' fees." On the same day the Court issued a separate order denying the motion of appellants Tony Avirgan and Martha Honey for leave to file a supplemental memorandum on the attorneys' fees issue.

The basis of this petition is the utter failure of the panel to explain the reasons underlying its conclusion that the appeals in these consolidated proceedings were so devoid of merit as to warrant the imposition of attorneys' fees. The only part of the order to address the issue is the following sentence: "We find that the appeals in these cases were frivolous . . .." Indeed, of the 10 words in that sentence, only the word "frivolous" could even arguably be said to constitute an explanation, and it simply announces the panel's conclusion, or as Justice Jackson said in

another context, the word is used "for the purpose of stating, rather than of reaching, a result . . .." Wickard v. Filburn, 317 U.S. 111, 123 (1942).

The law is clear that, before imposing sanctions, a court is obligated to explain the basis for doing so:

> the degree and extent to which a specific explanation must be contained in the record will vary accordingly with the particular circumstances of the case, including the severity of the violation, the significance of the sanctions, and the effect of the award.
>
> If the sanctions imposed are substantial in amount, type, or effect, appellate review of such awards will be inherently more rigorous; such sanctions must be quantifiable with some precision. Therefore, justification for the Rule 11 decision in the record must correspond to the amount, type, and effect of the sanction applied.

Thomas v. Capital Security Services, Inc., 836 F.2d 866, 883 (5th Cir. 1988) (en banc); Walter v. Fiorenzo, 840 F.2d 427, 436 (7th Cir. 1988) ("in cases involving substantial awards a district judge [must] state with some specificity the reasons for the imposition of a sanction"). This obligation is for the benefit of the parties and their attorneys, other attorneys and other litigants, and any reviewing court. It assures that the court imposing the sanction has carefully considered the matter and that it has properly exercised its discretion, consistent with the law. See Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447, 2461 (1990) (orders awarding sanctions subject to review under abuse of discretion standard). While it is possible that there are some cases which are so obviously without merit that a brief explanation of a sentence or two, coupled with a citation to controlling authority, might suffice, it is inconceivable that an order imposing attorneys' fees, where the requested amount approximates $400,000, could ever properly be based solely on the conclusory adjective "frivolous."

Beyond this general proposition, which alone requires rehearing, there are a number of specific issues that must be

addressed in any reasoned explanation of the result on this motion. Among those would include the following:

A. There were two sets of appeals, one from the grant of summary judgment, and the other from the imposition of $1.2 million in sanctions. Were both sets of appeals frivolous, and was the basis for the conclusion the same or different for each appeal?

B. What cases were so controlling that the appeal from the grant of summary judgment was frivolous? If there were no such cases, were there any findings of fact by the district court, which appellants did not contest, that made affirmance inevitable as to the entire appeal, and not just for some of the claims raised by appellants? If each and every argument was not frivolous, which were the frivolous ones?

C. What cases were so controlling that the appeal from the imposition of the sanctions was frivolous? If there were no such cases, were there any findings of fact made by the district court, which appellants did not contest, that made affirmance inevitable as to the entire appeal, and not just for some of the claims raised by appellants? If each and every argument was not frivolous, which were the frivolous ones?

D. When a judgment imposing sanctions of $1.2 million is entered against both clients and their attorneys, what are they supposed to do if they cannot take an appeal without running the risk of several hundred thousand dollars of additional attorneys' fees, where they believe that the district court which imposed the sanction was not only wrong on the sanctions, but wrong on the merits?

E. Appellees' fee request totaled approximately $400,000 for both appeals. The affidavits submitted, while difficult to comprehend in certain respects, indicate that the attorneys allegedly spent 1,150 hours defending the

summary judgment ruling, 1,190 hours on the sanctions appeal, and 210 hours preparing for and delivering the oral arguments for both appeals, for a total of approximately 2,550 hours. Considering the fact that the district court had written opinions on both issues, how can these appeals be frivolous if defendants say that they were required to expend that vast number of hours in this Court defending two rulings that they won below?

F. The Federal Rules of Appellate Procedure permit an appellee to file a brief of up to 50 pages. If these appeals were frivolous, why was it necessary for appellees to file briefs of 85 pages or more on each appeal, which is 70% more than the ordinary limit?

G. According to a recent conversation with the Clerk of this Court, the Court hears oral argument in only about 50% of the cases decided on the merits. If these appeals were frivolous, why did the screening panel recommend oral argument, why was oral argument allowed, why was substantial time allowed for oral argument, and why was the discussion at oral argument so spirited?

H. According to statistics obtained from the Administrative Office of the United States Courts, this Court issues published opinions in only about 31% of the decided cases. If these appeals were frivolous, why did the Court decide to publish an opinion, on which it deliberated for four months, and which extends to more than eight pages in the Federal Reporter?

I. If the sanctions appeal was frivolous, why was it necessary for appellees to take an additional 30 days to respond to the petitions for writs of certiorari on that appeal alone, and why was it necessary for them to devote 25 printed pages to their opposition?

J. Since this Court is fully familiar with these ap-

peals, what purpose is served by a remand to the district court to determine a reasonable fee for the work done in this Court, since the district court did not read the briefs, hear the oral argument, or participate in writing the opinion on which the determination that the appeals were frivolous was based?

K. Finally, the most glaring omission of all is that the Court failed to state who is responsible for paying these fees. Is it the clients, Tony Avirgan and Martha Honey, who are not attorneys, and who ought to be able to rely on their attorneys for deciding whether appeals on legal issues have merit? Is it the attorneys who represented them in the district court and against whom the $1.2 million in sanctions were jointly and severally entered? Or is it someone else, both in addition to, or instead of those individuals? Indeed, the order of remand is so vague that the district court will not know against whom to enter a judgment, if that is what this Court contemplated in its order.

* * *

If any district judge in this Circuit had imposed sanctions in an amount approaching that requested here, with no explanation beyond the one word conclusion "frivolous," this Court would summarily reverse and remand for a full explanation of the basis of that ruling. Kreager v. Solomon & Flanagan, P.A., 775 F.2d 1541, 1543 (11th Cir. 1985); Rothenberg v. Security Mgmt. Co., 736 F.2d 1470, 1472-73 (11th Cir. 1984). Surely, this Court can not evade the requirement that it imposes on others, particularly given the magnitude of the potential fee award here. For similar reasons, the Supreme Court has held that due process requires that the denial of welfare benefits be accompanied by a reasoned explanation. Goldberg v. Kelly, 397 U.S. 254, 271 (1970). Surely, if due process requires a reasoned explanation for the denial of a few hundred dollars of welfare benefits, no less is required for a potentially bankrupting judgment of $400,000.

The responses from district courts and administrative agen-

cies to requests for a reasoned explanation are always that of burden. Petitioners recognize that courts of appeals have heavy workloads and that full opinions for all sanctions cases would surely not be a good use of the Court's time. Plainly, it would be reasonable for a court to deny a request under Rule 38 without explanation, because the Rule is meant to apply only in extraordinary circumstances and a denial reflects no more than that the circumstances of the case are not so exceptional as to make the American rule inapplicable.

But here the order allowing an award of as much as $400,000 is an extraordinary event, requiring at least minimal explanation. If these appeals were truly frivolous, the task of explaining the basis for that conclusion should not be "onerous if the matter was dealt with in a conscientious manner in passing on the merits." Davis v. Clark, 404 F.2d 1356, 1358 (D.C. Cir. 1968) (Tamm, J.).

The real danger, here and elsewhere, is that the motion for sanctions was not dealt with in a conscientious manner and that the Court simply lashed out at parties who brought appeals that the Court would have preferred not to have to decide. That all too human reaction is precisely what the requirement of the reasoned statement is intended to prevent, and the absence of one here severely undermines the basis for the Court's conclusion that the appeals were frivolous.

Accordingly, the petition for rehearing should be granted. As the questions above make clear, appellants continue to believe that there is no basis for a finding that either the Rule 56 or the sanctions appeal was frivolous. But at the very least, the Court is obligated to provide a reasoned explanation of its conclusion to the contrary, so that the parties, other interested persons, and the Supreme Court can evaluate its reasoning.

Respectfully submitted,

/s/
Alan B. Morrison
Paul Alan Levy

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 833-3000

Attorneys for Tony Avirgan and
Martha Honey

/s/
Eugene Scheiman

805 Third Avenue
New York, New York
(212) 702-5885

Attorney for the Christic Institute

/s/
Daniel Sheehan

Pro Se
1324 North Capitol Street, N.W.
Washington, D.C. 20003
(202) 797-8106

Dated: March 17, 1992